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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10806

Agency No. A35-730-532

SANDRA FERGUSON,

Petitioner,

vs.

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

March 31, 2009

Before BIRCH, HULL and FAY, Circuit Judges.

HULL, Circuit Judge:

This petition requires us to address a question that has divided the other circuits and presents an issue of first

impression in ours. Does IIRIRA's[1] repeal of the INA's § 212(c) waiver provision[2] have an impermissible retroactive effect on aliens, like Sandra Ferguson, who were convicted of deportable criminal offenses before IIRIRA's effective date?

Until April 1, 1997 (the effective date of IIRIRA's repeal of § 212(c)), Ferguson was eligible to apply for a § 212(c) deportation waiver. But the INS initiated removal proceedings in 1998–over a year after § 212(c) was repealed. Despite its repeal, Ferguson maintains that IIRIRA has an impermissible retroactive effect and does not bar her from applying for § 212(c) relief. The question in Ferguson's petition is whether she can take advantage of the now-repealed § 212(c).

The Supreme Court has addressed this question before. *See INS v. St. Cyr*, 533 U.S. 289 (2001). It said that because a plea agreement "involves a *quid pro quo* between a criminal defendant and the government," *id.* at 321, aliens who pled guilty to a deportable offense "almost certainly relied" on the availability of § 212(c) relief in deciding to plead guilty and forgo their right to trial, *id.* at 325. Therefore, the repeal of § 212(c) has an impermissible retroactive effect on such aliens, and they remain eligible for § 212(c) relief. *Id.*

But Ferguson did not plead guilty. She was convicted by a jury. And therein lies her dilemma.

After determining that we have jurisdiction to hear the petition, we conclude that IIRIRA's repeal of § 212(c) does not have an impermissible retroactive effect on Ferguson.

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-597.

[2] The Immigration and Nationality Act ("INA"), § 212(c), 8 U.S.C. § 1182(c).

I. FACTUAL BACKGROUND

Petitioner Sandra Ferguson emigrated from Jamaica to the United States, and on August 4, 1977, she was admitted as a lawful permanent resident. Although her residence was lawful, her subsequent behavior was not. On November 20, 1985, the State's Attorney of Cook County, Illinois charged her with possessing and intending to distribute 30 grams of cocaine. *See* Ill. Rev. Stat. Ch. 56.5 § 1401- A(2) (1983).[3]

On July 7, 1986, following a trial in the Circuit Court of Cook County, the jury convicted Ferguson. On September 9, 1986, the circuit court sentenced Ferguson to six years in prison. But she served only two years and nine months.

About ten years later, on July 5, 1998, the INS[4] served Ferguson with a Notice to Appear charging her with removability under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for committing a controlled substances offense. On May 18, 1999, before the Immigration Judge ("IJ"), Ferguson admitted this charge in the Notice to Appear.[5] But she denied that she was removable.

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[3] The Illinois indictment contained the above citation. It appears to be consistent with the following citation: Ill. Comp. Stat., Ch. 56.5 § 1401(a)(2) (West 1988).

[4] On March 1, 2003, the INS ceased to exist. Its functions, now housed in the Department of Homeland Security ("DHS"), are divided principally among three agencies: U.S. Immigrations and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services.

[5] The INS also charged Ferguson with removability for committing an aggravated felony. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); INA § 101(a)(43)(f), 8 U.S.C. § 1101(a)(43)(f). Ferguson denied that she committed an aggravated felony, and the INS subsequently withdrew the claim as it pertained to her removability charge. But, as we explain below, the INS (and later the DHS) maintained that her controlled substances offense qualified as an aggravated felony

The IJ found Ferguson removable, pursuant to INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), based on her admissions and the evidence of her felony drug conviction. The IJ found that "the nature of her conviction" made her ineligible for cancellation of removal under INA § 240(a), 8 U.S.C. § 1229b.[6] The IJ ordered her removed to Jamaica.

Ferguson appealed to the Board of Immigration Appeals ("BIA"). Ferguson argued that she was eligible for cancellation of removal under § 240(a) because, at the time of her conviction in 1986, her crime was not considered an "aggravated felony" under immigration law. The BIA rejected her § 240(a) argument. But it remanded, in light of *INS v. St. Cyr*, 533 U.S. 289 (2001), to determine whether Ferguson might be eligible for discretionary relief from the Attorney

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for purposes of determining whether Ferguson was eligible for cancellation of removal. *See* footnote 6 *infra*.

[6] An alien "convicted of any aggravated felony" is ineligible for cancellation of removal. 8 U.S.C. § 1229b(a)(3). *See Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1303 (11th Cir. 2004) ("IIRIRA§ 304(b) repealed INA § 212(c) and replaced it with a more restrictive provision in INA § 240(a) called 'cancellation of removal.' *See* 8 U.S.C. § 1229b. . . . § 304 of IIRIRA provided that cancellation of removal was not available to an alien convicted of any aggravated felony." (citation and quotation marks omitted)); *Mohammed v. Ashcroft*, 261 F.3d 1244, 1248 n.3 (11th Cir. 2001) ("Status as an 'aggravated felon' renders an alien ineligible for discretionary relief–called cancellation of removal–under 8 U.S.C. § 1229b."). The INA defines an "aggravated felony" as including a "drug trafficking crime (as defined in section 924(c) of Title 18)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). "[T]he term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act [("CSA")] (21 U.S.C. 801 *et seq.*). . . ." 18 U.S.C. § 924(c)(2). And the CSA, in turn, defines a "felony" as an offense for which "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. § 3559(a).

That arduous maze of statutory interpretation all means that Ferguson was not entitled to cancellation of removal because her felony drug crime, for which she was sentenced to five years in prison, constituted an "aggravated felony."

General under INA § 240(a)'s predecessor–the now-repealed INA § 212(c), 8 U.S.C. § 1182(c).

Because the record was ambiguous as to whether Ferguson was convicted at trial or pled guilty, the BIA remanded to the IJ to figure it out. At an evidentiary hearing before the IJ, Ferguson admitted that she was convicted at trial. But she argued that she was still eligible for a deportation waiver because, at the time Congress repealed § 212(c) in 1996, she was still eligible to apply for such relief. In other words, she argued that the repeal of § 212(c) does not apply retroactively to those who were eligible to apply for such relief before the date of repeal.[7]

The IJ found that she was convicted at trial. Therefore, the IJ again determined that she was ineligible for a § 212(c) waiver and reinstated the removal order. Ferguson again appealed to the BIA and challenged the IJ's ruling on § 212(c) availability. Her appeal raised the same arguments that she made before the IJ.

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[7] Ferguson further argued that, pursuant to *Cunningham v. U.S. Att'y Gen.*, 335 F.3d 1262, 1267 (11th Cir. 2003), she was eligible for § 212(c) relief because the INS served her with an Order to Show Cause (the precursor to the Notice to Appear) while she was still in prison in 1986 (and before Congress repealed § 212(c)). The IJ rejected Ferguson's *Cunningham* argument because she had no documentation to support her assertion that the INS began deportation proceedings prior to the repeal of § 212(c).

The BIA affirmed. It determined that Ferguson had no proof that the INS served her with an Order to Show Cause in 1986. Here, Ferguson does not dispute the BIA's rejection of her claim as unsubstantiated by any evidence. Rather, Ferguson focuses her petition on whether § 212(c) applies to aliens who were convicted at trial prior to the date of § 212(c)'s repeal. Thus, Ferguson has abandoned her claim that she was served in 1986. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) ("[T]he law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.").

The BIA affirmed the IJ's decision "in its entirety." The BIA rejected Ferguson's § 212(c) argument. It determined that a federal regulation made Ferguson ineligible. The BIA pointed to 8 C.F.R. § 1212.3(f)(4) as support for its conclusion that only individuals who pled guilty prior to the change in the law are eligible for § 212(c) relief.[8] The BIA based its ruling on the "clear language" of the federal regulation and the absence of any Eleventh Circuit authority extending *St. Cyr* to trial-based convictions as opposed to guilty pleas.

Ferguson filed a petition for review with this Court. The petition requires us to answer two questions. First, do we have jurisdiction to hear Ferguson's challenge to the BIA's pretermition of her application for a § 212(c) deportation waiver? Second, does IIRIRA's repeal of § 212(c) relief have an impermissible retroactive effect on aliens, like Ferguson, who were convicted of deportable criminal offenses by a jury prior to IIRIRA's effective date?

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[8] 8 C.F.R. 1212.3(f) provides, in part:

(4) The alien has been charged and found to be deportable or removable on the basis of a crime that is an aggravated felony, as defined in section 101(a)(43) of the Act (as in effect at the time the application for section 212(c) relief is adjudicated), except as follows:

(i) An alien whose convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a term of imprisonment of five years or more for such aggravated felony or felonies, and

(ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990; or

(5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

II. JURISDICTION

This Court's jurisdiction to review Ferguson's removal order is limited. Congress has divested courts of "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed," among other things, a controlled substances offense. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title."). [9] And Ferguson does not contest that she is removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(A)(iii). But we retain jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D); *see Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191, 1195-96 (11th Cir. 2008); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (exercising jurisdiction under § 1252(a)(2)(D) to review petitioner's legal argument as to eligibility for relief under § 212(c)); *Balogun v. U.S. Att'y Gen.*, 425 F.3d 1356, 1360 (11th Cir. 2005) (discussing legislative history of § 1252(a)(2)(D)).

Here, Ferguson raises a pure question of law. That is, she argues that IIRIRA's repeal of § 212(c) has an impermissible retroactive effect on aliens like herself. She asks us to extend the holding of *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), to

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[9] Section 1182(a)(2)(A)(i)(III) includes a crime that involves "a violation of . . . any law of a State . . . relating to a controlled substance." Section 1227(B)(i) includes "a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." Under § 1252(a)(2)(C), our jurisdiction is limited to determining whether a petitioner is an (1) alien (2) who is removable (3) for a disqualifying offense. *Moore v. Ashcroft*, 251 F.3d 919, 922-23 (11th Cir. 2001).

aliens convicted after a trial. *Id.* (holding "that § 212(c) relief remains available to aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect").

This is not the first time that we have been presented with a similar legal issue. But the last time we were, a jurisdictional bar stood in our way. In *Brooks v. Ashcroft*, 283 F.3d 1268, 1274-75 (11th Cir. 2002), this Court concluded that we lacked jurisdiction to review "the purely statutory question" of whether AEDPA [10] and IIRIRA applied retroactively to bar the petitioner's eligibility for § 212(c) relief. Subsequently, Congress enacted 8 U.S.C. § 1252(a)(2)(D), which removes that jurisdictional bar and supersedes the jurisdictional part of *Brooks*. *See* the Real ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) (authorizing judicial review of "questions of law"). Furthermore, Ferguson's petition does not question the IJ or the BIA's exercise of discretion. Rather, she challenges the BIA's interpretation of *St. Cyr*. We therefore have jurisdiction to address the pure question of law raised by Ferguson's petition.

III. *ST. CYR* AND IMPERMISSIBLE RETROACTIVITY

The outcome of this case turns largely on our interpretation of the Supreme Court's decision in *St. Cyr*. Therefore, we begin by recounting *St. Cyr*. Because the circuit courts are divided on this issue, we examine their approaches as well. We then examine what we have said, albeit in dicta, about *St. Cyr*. Lastly, we apply the law to Ferguson.

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[10] The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996).

A. *INS v. St. Cyr*

INS v. St. Cyr addressed the way that two statutory amendments to the INA—namely, AEDPA and IIRIRA—impacted § 212(c), 8 U.S.C. § 1182(c).[11] Before AEDPA and IIRIRA, § 212(c) authorized the Attorney General, in her discretion, to waive an alien's deportation if the alien was a lawful permanent resident who had lived in the United States continuously for seven years. INA § 212(c), 8 U.S.C. § 1182(c).[12] Congress first began tinkering with § 212(c) relief with the Immigration Act of 1990. *See* Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (IMMACT-90). That Act

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[11] INA § 212(c) states:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

INA § 212(c), 8 U.S.C. § 1182(c).

[12] Although § 212(c), as written, applies only to excludable aliens (as opposed to deportable aliens), courts and the BIA have interpreted it to authorize any permanent resident alien with a lawful unrelinquished domicile of seven consecutive years to apply for a discretionary waiver from deportation if the basis of the removal has a statutory counterpart in exclusion under § 212(a). *See Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317, 1324-25 (11th Cir. 2001); *Yeung v. INS*, 76 F.3d 337, 338-41 (11th Cir. 1995); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1457-59 (11th Cir. 1994). Thus, to be eligible for § 212(c) relief, Ferguson must show that the basis for removal—a controlled substance offense—has a comparable statutory basis for exclusion under § 212(a). *See Farquharson*, 246 F.3d at 1324-25; *Yeung*, 76 F.3d at 338-41; *Rodriguez-Padron*, 13 F.3d at 1457-59; *see also* 8 CFR § 1212.3(f)(5). The INS does not dispute that Ferguson has done that.

"amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years." *St. Cyr*, 533 U.S. at 297.

In 1996, Congress amended § 212(c) two more times. *See Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1302-03 (11th Cir. 2004) (summarizing impact of AEDPA and IIRIRA on § 212(c)). First, it passed AEDPA. Section 440(d) of that statute bars § 212(c) relief for aliens who committed a broad set of offenses, including a controlled substances offense. *See* 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). And in September of 1996, IIRIRA repealed § 212(c) relief altogether. *See* § 304(b), 110 Stat. 3009-597. In its place, Congress created a "cancellation of removal" procedure. *St. Cyr*, 533 U.S. at 297 (citing IIRIRA § 304(b), 110 Stat. 3009-594) (codified at 8 U.S.C. § 1229b).[13] IIRIRA § 304(b) stripped the Attorney General's authority to waive deportation, now called removal, for any alien convicted of an "aggravated felony." *Id.*

St. Cyr addressed whether an alien who was convicted of a deportable offense was still eligible for § 212(c) relief where (1) he was convicted of an aggravated felony in March of 1996, (2) deportation proceedings did not begin until April 10, 1997 (after both IIRIRA and AEDPA went into effect), and (3) he was otherwise eligible to apply for § 212(c) relief

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[13] 8 U.S.C. § 1229b(a)'s "cancellation of removal" provision provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
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> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

but for the retroactive application of IIRIRA and AEDPA. 533 U.S. at 315. Put differently, the question was whether IIRIRA's repeal of § 212(c) relief had an impermissible retroactive effect on aliens whose convictions were obtained through guilty pleas, notwithstanding the fact that they were eligible for § 212(c) relief at the time they pled guilty.

The Supreme Court said yes. Drawing on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court held that IIRIRA had an impermissible retroactive effect on aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *St. Cyr*, 533 U.S. at 326.

The Supreme Court first explained that "[r]etroactive statutes raise special concerns." *Id.* at 315. It reasoned that the "presumption against retroactive legislation is deeply rooted in our jurisprudence" and "embodies a legal doctrine centuries older than our Republic." *Id.* at 316 (quotation marks omitted). And it warned that retroactive legislation has the power to "sweep away settled expectations suddenly and without individual consideration" and raises the specter that Congress "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 315. Although Congress has the power to enact laws with retroactive effect, Congress must clearly indicate that it intended such a result. *Id.* at 316. Accordingly, "'congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'" *Id.* at 315-16 (omission in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

Therefore, the first step in the impermissible-retroactive-effect determination is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively. *Id.* at 316. The Supreme Court held that IIRIRA failed that test. *Id.* at 319-20. But the absence of clear

intent did not end the Supreme Court's *Landgraf* analysis.

Rather, the Supreme Court instructed that even if Congress has not spoken clearly, courts must proceed to a second step to determine whether depriving removable aliens of consideration for § 212(c) relief produced an "impermissible retroactive effect" for aliens convicted pursuant to a guilty plea. *Id.* at 320. This second inquiry into whether a statute operates retroactively requires courts to make a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 321 (quotation marks and citation omitted). "A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or *attaches a new disability, in respect to transactions or considerations already past.*" *Id.* (quotation marks and citations omitted) (emphasis added). The Supreme Court did not stop there. It added that "the judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, *reasonable reliance*, and settled expectations."'" *Id.* (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (quoting *Landgraf*, 511 U.S. at 270)) (emphasis added).

Applying this framework to those who "entered into plea agreements with the expectation that they would be eligible for [§ 212(c)] relief," the Supreme Court in *St. Cyr* first determined that IIRIRA's repeal of "any possibility of § 212(c) relief . . . clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* (quotations marks and citations omitted). To demonstrate a new disability to a past transaction or consideration, the Supreme Court explained that aliens reasonably rely on the possibility of obtaining § 212(c) relief in considering whether to waive their right to trial and plead guilty:

> Plea agreements involve a *quid pro quo* between a criminal defendant and the

> government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources. There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.

Id. at 321-22 (quotation marks and citations omitted). The key "transaction" or "consideration already past" was the alien's decision to abandon his constitutional right to trial and plead guilty in reliance on the old § 212(c). *Id.* at 325. "Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.*

Accordingly, the Supreme Court held that "§ 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326. The Supreme Court did not directly address whether an alien who pled guilty had to show individualized reliance on § 212(c) in entering a guilty plea or whether the class of aliens who pled guilty reasonably relied

on § 212(c). But the tenor of *St. Cyr* as a whole appears to treat aliens who pled guilty before IIRIRA as a group of similarly-situated applicants eligible for such relief. *Id.* at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."); *id.* at 325-26 (concluding that St. Cyr "and other aliens like him" remain eligible for § 212(c) relief); *id.* at 325 ("Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forego their right to a trial . . . ."); *id.* at 323 ("Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.").[14] As noted earlier, Ferguson did not plead guilty, and she asks us to extend *St. Cyr* outside of the guilty plea context.

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[14] *See Wilson v. Gonzales*, 471 F.3d 111, 119 (2d Cir. 2006) (discussing *St. Cyr* and concluding the Supreme Court endorsed the categorical presumption that it would be impermissible to apply the repeal of § 212 retroactively to the category of aliens who pled guilty before IIRIRA); *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (noting that "under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for § 212(c) relief"); *see also Garcia-Echaverria v. United States*, 376 F.3d 507, 515 (6th Cir. 2004) (stating in dicta that "*St. Cyr* aids only those aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for [discretionary cancellation of removal] at the time of their plea under the law then in effect" (quotation marks and emphasis omitted) (alteration in original)).

B. Other Circuits' Approaches

The circuits are split on how to apply *St. Cyr* to aliens outside of the guilty plea context.

The majority of circuits to address the issue have held that IIRIRA does not have an impermissible retroactive effect on aliens who relied on § 212(c) relief in deciding to go to trial. *See Hernandez-Castillo v. Moore*, 436 F.3d 516, 520 (5th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004); *Rankine v. Reno*, 319 F.3d 93, 102 (2d Cir. 2003); *Chambers v. Reno*, 307 F.3d 284, 290-93 (4th Cir. 2002); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) ("[A]pplication of the new statutory limitations on discretionary relief does not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial."); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1131 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2499 (2008) (indicating that, "[i]n our circuit, we have generally limited *St. Cyr* to the factual context of a guilty plea," and "[o]utside of the plea bargain context . . . we have declined to invalidate retroactive elimination of § 212(c) relief"); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (stating that unlike aliens who pled guilty, "aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about [AEDPA's] § 440(d)").[15]

"[A]liens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty" because "none of [them] detrimentally

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[15] In *Saravia-Paguada*, the Ninth Circuit interpreted *Armendariz-Montoya* as classifying reliance on § 212(c) when an alien goes to trial as "*per se* unreasonable," and emphasized that the decision "reaffirmed a narrow reading of *St. Cyr* and excluded categorically claims for § 212(c) relief outside the guilty plea context." 488 F.3d at 1131.

changed his position in reliance on continued eligibility for § 212(c) relief." *Rankine*, 319 F.3d at 99. Such aliens "have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial." *Id.* at 100; *Hernandez-Castillo*, 436 F.3d at 520 (quoting *Rankine*);[16] *Chambers*, 307 F.3d at 291 ("[I]n contrast to aliens who plead guilty, Chambers [in proceeding to trial] made no decision that adversely impacted his immigration status."). "As the [Supreme] Court made clear, it was that reliance, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA." *Rankine*, 319 F.3d at 100; *see Chambers*, 307 F.3d at 290 ("The key event in terms of *St. Cyr's* analysis . . . was the alien's decision to abandon his constitutional right to a trial and plead guilty to a deportable offense in reliance on prior law."); *Montenegro*, 355 F.3d at 1037 ("But this exception does not apply to aliens like Montenegro who chose to go to trial; such aliens did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief.");[17] *Mbea v. Gonzales*, 482 F.3d 276, 281 (4th Cir.

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[16] Indeed, aliens who choose to go to trial do not do so in reliance on the availability of § 212(c) relief. They do so to fight their criminal charges. *Rankine*, 319 F.3d at 99-100 (noting that *St. Cyr*'s rationale does not extend to such a "hollow" claim); *see also Domond v. INS*, 244 F.3d 81, 86 (2d Cir. 2001) ("[I]t cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation."); *Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2001) ("[I]t would border on the absurd to argue that an alien would refrain from committing crimes or would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him. Thus, Lara-Ruiz cannot seriously maintain that the application of any rule barring discretionary relief from removal or deportation would upset his settled expectations sufficiently to trigger the presumption against retroactivity.") (quotation marks and citation omitted).

[17] Under the the Seventh Circuit's approach, even though *St. Cyr* protects aliens who pled guilty, they must still demonstrate that they

2007) ("We held that IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial.").[18]

As noted, the Second Circuit has expressly refused to extend *St. Cyr* to aliens who proceeded to trial. *Rankine*, 319 F.3d at 102 ("Because we have not found a persuasive argument that the holding in *St. Cyr* can be extended to cover those aliens who were convicted at trial rather than pursuant to a plea, we conclude that the repeal of § 212(c) relief does not have an impermissibly retroactive effect when applied to petitioners."); *Chambers*, 307 F.3d at 290-93. Subsequently, in *Restrepo v. McElroy*, 369 F.3d 627, 634 (2d Cir. 2004), the Second Circuit "fine-tuned its *St. Cyr-Rankine* jurisprudence" and "held that under certain limited circumstances, an alien-defendant who was convicted pursuant to a jury trial prior to the enactment of AEDPA could still potentially be eligible for § 212(c) relief." *See Wilson v. Gonzales*, 471 F.3d 111, 120 (2d Cir. 2006). In *Restrepo*, the Second Circuit concluded that

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actually relied on the availability of § 212(c) in deciding to plead guilty. *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), *cert. denied*, 129 S. Ct. 489 (2008).

[18] In another line of authority, the Fourth Circuit seems to reject actual reliance as a necessary component of the retroactivity analysis. *See Olatunji v. Ashcroft*, 387 F.3d 383, 392 (4th Cir. 2004) ("[F]ar from holding that reliance is the sine qua non of retroactivity, both *Chambers* and *Velasquez-Gabriel* said precisely the opposite, that even aliens who have not detrimentally relied on pre-IIRIRA law can sustain a claim that IIRIRA is impermissibly retroactive." (emphasis omitted)). But the impact of *Olatunji* is unclear as it did not involve § 212(c), but rather the retroactive application of a different IIRIRA provision (that rendered Olatunji "inadmissible" pursuant to a conviction). Id. at 386. As the Tenth Circuit noted, "there is tension between *Olatunji* and *Chambers*, but [we] observe that they construe different provisions of the INA. . . . This broad repudiation of reliance is potentially in conflict with the reasoning of *Chambers*, which gives reliance a central role in its analysis." *Hem v. Maurer*, 458 F.3d 1185, 1192 n.4 (10th Cir. 2006).

an alien may show detrimental reliance when he decides to "forgo the immediate filing of a 212(c) application based on the considered and reasonable expectation that he would be permitted to file a stronger application for 212(c) relief at a later time." 369 F.3d at 634-35. The Second Circuit noted that the

> undermining of this settled expectation represents a prototypical case of retroactivity. Just like the aliens in *St. Cyr*, who sacrificed something of value—their right to a jury trial, at which they could obtain outright acquittal—in the expectation that their guilty pleas would leave them eligible for 212(c) relief, an alien like Petitioner also sacrificed something—the shot at obtaining 212(c) relief by immediately filing an application—in order to increase his chances of obtaining such relief later on. Such an alien conformed his or her conduct according to the availability of relief, and therefore had settled expectations that would be severely upset, were the AEDPA to be applied retroactively.

Id. (quotation marks, citations, and footnote omitted). In other words, aliens in the Second Circuit can prove detrimental reliance, under the *St. Cyr* framework, by showing that they affirmatively chose to forego filing their § 212(c) application for discretionary relief in order to build up a better record and boost the odds that their applications would be granted. *Id.* In *Restrepo*, the Second Circuit remanded for the district court to determine in the first instance: (1) whether Restrepo must make an individualized showing of reliance instead of reaping the benefit of a categorical presumption of reliance; and (2) if so, whether Restrepo could make that showing. *Id.* at 638-39. Since *Restrepo*, the Second Circuit has required an "individualized showing of reliance" to prove such claims. *Wilson*, 471 F.3d at 122. "Merely knowing of the continued

availability of § 212(c) relief is not the equivalent to affirmative reliance in its continued availability." *Id.*

The Fifth Circuit follows the *Restrepo* approach. *See Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 208-09 (5th Cir. 2007) ("We find the reasoning of the *Restrepo* Court persuasive and see no need to create a circuit split on this issue."). But outside of the guilty plea context, the Fifth Circuit, like the Second, requires a showing of individualized reliance as opposed to a categorical presumption of reliance. *Id.* at 205 ("After *Hernandez-Castillo*, this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application."). Under this approach, "[b]ecause the reliance demonstrated must be actual, the determination of retroactive effect is made as to the individual applicant, not as to a group of similarly-situated applicants." *Id.*

The Tenth Circuit extends *St. Cyr* beyond the guilty plea context and rejects a requirement of actual, subjective reliance. *See Hem v. Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006). In *Hem*, the Tenth Circuit found that an alien shows objectively reasonable reliance on § 212(c) relief where she gives up her right to appeal her criminal conviction.[19] *Id.* But its approach is not limited to those who gave up their appeals. Its general approach is to determine "whether the class of persons affected by retroactive application of a statute had an

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[19] Under *Hem*, an alien does not show objective reliance by simply foregoing the right to appeal. Rather, the alien must also show that a successful appeal would have placed him "at risk of being sentenced to a sentence longer than 5 years . . . making him ineligible for § 212(c) relief." *Hem*, 458 F.3d at 1199. Indeed, Hem was sentenced to three years. Therefore, resentencing carried the risk of a sentence longer than five years, which would have shut the door on his hopes of § 212(c) relief. *See* footnote 22 *infra* (explaining IMMACT-90's five year bar).

objectively reasonable interest in the previous state of the law." *Id.* at 1200. "Aliens, like Hem, who were in a position in which the availability of § 212(c) relief would reasonably inform their decision to forego a constitutional right, would suffer 'new legal consequences to events completed before [the statute's] enactment,' *Landgraf*, 511 U.S. at 269-70, under IIRIRA § 304(b)." *Id.* at 1200-01.[20] Therefore, such aliens are eligible for § 212(c) relief.

The Third Circuit, on the other hand, does not require aliens to show reliance or a reliance interest—either objective or subjective—on § 212(c) relief and has concluded that IIRIRA's repeal of § 212(c) is impermissibly retroactive in that it attaches new legal consequences to an alien's criminal conviction. *See Atkinson v. Att'y Gen.*, 479 F.3d 222, 231 (3d Cir. 2007). Because the Third Circuit's approach substantially differs from that of the other circuits, and because Ferguson urges us to adopt it, we discuss it in some detail. In the Third Circuit's view, the Supreme Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." *Id.* at 227-28. "[R]eliance is but one consideration in assessing

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[20] In *Hem*, the question was whether "[a]liens, like Hem, who were in a position in which the availability of § 212(c) relief would reasonably inform their decision to forego a constitutional right, would suffer new legal consequences to events completed before the statute's enactment under IIRIRA § 304(b)." *Hem*, 458 F.3d at 1200-01. The petitioner in *Hem* was able to prove that she was part of a class of "[a]liens who gave up their right to appeal their aggravated felony conviction when a successful appeal could have deprived them of § 212(c) eligibility." *Id.* at 1199; *see id.* at 1200 ("When a defendant, like Hem, proceeds to trial, is convicted, chooses not to pursue an appeal when that appeal could result in the loss of § 212(c) relief, and subsequently loses the availability of § 212(c) relief following the Attorney General's decision to apply IIRIRA § 304(b) retroactively, his right to appeal has been retroactively impaired."). And, therefore, the Tenth Circuit held that Hem was still eligible for § 212(c) relief.

whether a statute attaches new legal consequences to past events." *Id.* at 231. The Third Circuit reads Supreme Court precedent not as requiring that the alien must have relied on the old § 212(c), but rather as undertaking a "general analysis of the impact of the amendment, finding retroactivity improper because the amendment instituted a legal change that attached a new legal burden to the proscribed conduct." *Id.* at 228. "Impermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." *Id.* at 229.

Therefore, based on its interpretation of *St. Cyr* and *Landgraf*, the Third Circuit phrased the relevant question as only: "Does applying IIRIRA to eliminate the availability of discretionary relief under former section 212(c) attach new legal consequences to events completed before the repeal?" *Id.* at 230. It answered that question by using Atkinson's conviction as the event completed, noting that

> Atkinson's case presents a straightforward application of the retroactive effect test. IIRIRA has plainly attached new legal consequences to Atkinson's conviction. Prior to IIRIRA's enactment, Atkinson remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony. After IIRIRA, he lost that right; applying basic principles of retroactivity, IIRIRA attached a new legal consequence to Atkinson's conviction: the certainty–rather than the possibility–of deportation. Such a change in legal consequences based on events completed before IIRIRA's enactment constitutes an impermissible retroactive effect.

Id. (citation omitted).[21] While the law of the circuits is not uniform, none of the other circuits has adopted the Third Circuit's approach.

C. Eleventh Circuit's Interpretations of *St. Cyr*

Although our Court has not squarely decided the retroactivity issue splitting the circuits, we have come close to doing so on two occasions. We have all but said that *St. Cyr*'s retroactivity analysis does not apply to aliens who were convicted after a trial–as opposed to a guilty plea–and that § 212(c) relief is, therefore, not available to such aliens. Here, we examine our two prior decisions.

In *Alexandre v. United States Attorney General*, 452 F.3d 1204, 1205 (11th Cir. 2006), this Court addressed the BIA's denial of Alexandre's "motion to reopen his deportation

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[21] In the Third Circuit's view, "[n]owhere in the Supreme Court's jurisprudence . . . has reliance become the *sine qua non* of the retroactive effects inquiry. Moreover, nothing in the *Landgraf* line of cases supports the theory that the limits of permissible retroactivity are different for one group–those who accept (or consider) a plea agreement–than they are for another–those who exercise their constitutional right to a trial." *Atkinson*, 479 F.3d at 231 (citation omitted).

The Fourth Circuit in *Chambers* expressly rejected the view, taken by the Third Circuit, that the repeal of § 212(c) creates "new legal consequences." 307 F.3d at 293. Whereas the Third Circuit identified the relevant past conduct as the alien's conviction (when determining that IIRIRA imposes "new legal consequences" on that act), the Fourth Circuit treated the relevant past conduct as the "*decision to go trial*." *Id.* The Fourth Circuit also reasoned that in *St. Cyr*, the alien's decision to plead guilty "immediately changed his status from non-deportable to deportable." *Id.* at 290. In contrast, an alien like Chambers–who did not plead guilty–made "no decision that adversely impacted his immigration status." *Id.* at 291. "IIRIRA did not change the impact of Chambers' *decision to go to trial* on his immigration status. . . . Chambers' decision to go to trial did not render him deportable or subject him to certain deportation, regardless of whether pre- or post-IIRIRA law is applied." *Id.* at 293.

proceedings in order to permit him to apply for relief under former INA § 212(c)." The BIA denied the motion and concluded that Alexandre was ineligible for § 212(c) relief. *Id.* Alexandre (1) had been convicted of drug charges (considered an "aggravated felony"), (2) following a 1989 jury trial, and (3) had served five years of his sentence. *Id.* Relying on the five-year bar in the Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 ("IMMACT-90"),[22] the BIA determined that Alexandre was precluded from seeking § 212(c) relief. *Id.* at 207.

This Court denied Alexandre's petition for review of the BIA's denial of his motion to reopen. *Id.* at 1207. We noted that Alexandre was convicted in 1989 and that when deportation proceedings began in 1994 "he had served at least 5 years of his sentence." *Id.* We stated that "the retroactivity rationale of *St. Cyr* does not apply to IMMACT-90." *Id.* "Thus, at the time of his deportation proceedings, [Alexandre] was ineligible for § 212(c) relief because of the five-year bar." *Id.* Citing federal regulation 8 C.F.R. § 1003.44(a) we also stated that "§ 212(c) relief is not available to aliens who were convicted after a trial instead of on a guilty plea." *Id.*

Although Alexandre argued that IMMACT-90's five-year bar produced "an impermissible retroactive effect because he committed his crime before the statute including [the bar] was passed," this Court determined that his "argument was resolved in [his] initial appeal before the BIA, and *for that reason it [was] not properly before us*" in the petition for review of the denial of his motion to reopen. *Id.* (emphasis added). We also noted, albeit in dictum, that "[e]ven if the

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[22] IMMACT-90 "provided that an alien convicted of an aggravated felony who had served at least five years of his sentence could not seek a waiver of inadmissibility under then INA § 212(c)." *Alexandre*, 452 F.3d at 1207.

retroactivity rationale of *St. Cyr* did apply to IMMACT-90, it would not apply to Alexandre because he did not plead guilty to his drug trafficking charges, but instead proceeded to trial and was convicted by a jury." *Id.*[23]

Alexandre is instructive. But it does not squarely resolve the issue presented in this petition. *Alexandre* involved a different statute that did not repeal all of § 212(c). And we stated quite clearly, "the retroactivity rationale of *St. Cyr* does not apply to IMMACT-90." *Id.* Admittedly, *Alexandre* did state that "§ 212(c) relief is not available to aliens who were convicted after a trial instead of on a guilty plea." *Id.* However, our comments on the retroactivity issue and the scope of *St. Cyr* were classic dicta because we explicitly noted that the retroactivity issue was "not properly before us." *Id.*

As we noted earlier, the same retroactivity issue was presented in *Brooks v. Ashcroft*, 283 F.3d 1268, 1273-74 (11th Cir. 2002), but a jurisdictional bar, now removed by 8 U.S.C. § 1252(a)(2)(D), prevented us from resolving it.[24] 283 F.3d at 1271-73. Although *Brooks* does not control the discrete retroactivity issue now before us, it also sheds light on our interpretation of *St. Cyr*.

In *Brooks*, we addressed and rejected two constitutional challenges–under the Sixth Amendment and the Equal

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[23] We further mentioned that "[e]ven without the five-year bar, the plain language of § 1003.44 also precludes those who did not plead guilty from relief." *Alexandre*, 452 F.3d at 1207.

[24] As we explained in Part II. *supra*, the Real ID Act of 2005 subsequently conferred federal courts with jurisdiction to address pure legal issues in the removal context. *See* 8 U.S.C. § 1252(a)(2)(D). Therefore, *Brooks* has only been superseded as to its jurisdictional component, not its endorsement of the constitutionality of the *St. Cyr* framework. *Brooks*, 283 F.3d at 1272- 73, *superseded in part by* 8 U.S.C. § 1252(a)(2)(D).

Protection Clause–to applying IIRIRA's repeal of § 212(c) to aliens, like Brooks, who were convicted before IIRIRA's effective date. First, Brooks argued that applying IIRIRA "would impermissibly penalize him for exercising his Sixth Amendment rights." Brooks argued that since *St. Cyr* authorized those who pled guilty to apply for § 212(c) relief, applying it to an alien convicted after a trial necessarily penalized him for exercising his Sixth Amendment right to trial. *Id.*

This Court rejected Brooks's Sixth Amendment challenge. Nothing in *St. Cyr* changed the fact that Brooks "was given the opportunity to be heard, the right to examine witnesses against him, the right to offer testimony, and the right to be represented by counsel." *Id.* We were "thus hard-pressed to see how his Sixth Amendment rights were violated." *Id.* We quoted *St. Cyr* for the proposition that alien defendants are "acutely aware of the immigration consequences of their convictions." *Id.* at 1274 (quoting *St. Cyr*, 533 U.S. at 322). We concluded that "Brooks weighed his options and was given a full trial, and was thus accorded his Sixth Amendment rights." *Id.*

This Court also rejected Brooks's Equal Protection challenge. *Id.* Brooks argued that "it violates the Equal Protection Clause to apply IIRIRA § 304(b) retroactively to aliens whose convictions preceded the enactment of IIRIRA, but yet preventing such retroactive application against aliens who pled guilty as in *St. Cyr*." *Id.* But we found that there was a rational basis for distinguishing between the two groups. *Id.* And we quoted approvingly *St. Cyr*'s explanation of why plea agreements involve a quid pro quo, tit-for-tat exchange, between a criminal defendant and the government. Therefore, we concluded that Brooks's Equal Protection claim had "no merit." *Id.* Nonetheless, *Brooks* did not directly address whether IIRIRA's repeal of § 212(c) had an impermissible retroactive effect–the question that Ferguson raises here.

D. Ferguson's Petition

Ferguson argues that the BIA erred by limiting *St. Cyr* exclusively to guilty pleas and urges us to reject any reliance requirement for the purpose of determining whether IIRIRA's repeal of § 212(c) impermissibly applies retroactively to aliens like herself.[25] Ferguson argues that because IIRIRA impermissibly attached new legal consequences and inflicted new legal disabilities on her past conviction, she is still eligible to apply for § 212(c) relief. And she asks us to adopt an approach akin to the Third Circuit's.

The government, on the other hand, asks that we narrowly interpret the *St. Cyr* retroactivity shield as only applicable to aliens who pled guilty. It points out that the Executive Office for Immigration Review has promulgated regulations consistent with this narrow interpretation of *St. Cyr*.[26] The government contends that only those aliens who pled guilty can show reliance interests strong enough to warrant tempering the retroactive effects of IIRIRA's repeal of § 212(c).

We decline to adopt the approach urged by Ferguson. In our view, reliance is a core component of *St. Cyr*'s retroactivity analysis as it applies to aliens challenging the application of IIRIRA's repeal of § 212(c). For starters, we do not write on a blank slate. In *Alexandre*, we interpreted the "retroactivity rationale of *St. Cyr*" as inapplicable where the alien "did not plead guilty to his drug trafficking charge, but

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[25] We review the BIA's statutory interpretation *de novo*. *Sarmiento v. U.S. Att'y Gen.*, 381 F.3d 1277, 1279-80 (11th Cir. 2004). We owe no deference when the issue involves the retroactive application of a statute. *Id.* at 1280.

[26] Exec. Office for Immigration Review, Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed.Reg. 57,826 (Sept. 28, 2004) (codified at 8 C.F.R. pts. 1003, 1212, 1240 (2006)).

instead proceeded to trial and was convicted by a jury." 452 F.3d at 1207. Although this dictum is not binding, we recognize it as a persuasive reason to reject Ferguson's argument that reliance should not bear on a retroactivity analysis in this context.

Second, our reading of *St. Cyr* bolsters our conclusion. To take an alternate view would render the Supreme Court's reasoning and analytical approach— explained in *St. Cyr*— superfluous by half. Were Ferguson correct, the Supreme Court's discussion of reliance in *St. Cyr* was a wholly unnecessary and gratuitous academic exercise. And the notion that IIRIRA "plainly attached new legal consequences to [Ferguson's] conviction," *Atkinson*, 479 F.3d at 230, was so plain that it was lost on the Supreme Court. The fact that it is possible to advance a retroactivity claim in some circumstances without a showing of reliance does not give us carte blanche to discard the Supreme Court's pronouncements on the matter.

Even if reliance is not the only basis for determining whether a statute is impermissibly retroactive, *see St. Cyr*, 533 U.S. at 321 n.46, the retroactivity analysis is still "informed and guided by considerations of fair notice, reasonable reliance, and settled expectations," *id.* That is, just because an alien is not required to demonstrate reliance does not mean that she may exclusively rely on other portions of the Supreme Court's retroactivity jurisprudence and pretend reliance is irrelevant.[27]

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[27] In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006), the Supreme Court addressed whether INA § 241(a)(5) had an impermissible retroactive effect on aliens who "reentered the United States before IIRIRA's effective date." The Supreme Court held that *St. Cyr*'s retroactivity rationale, which involved the *quid pro quo* nature of a guilty plea as it applied to eligibility for § 212(c) relief, did not address the concerns present when § 241(a)(5) applies. *Id.* at 44. "[Section 241(a)(5)]

We recognize the Supreme Court has refused to adopt a rigid, single test for determining whether a statute has an impermissible retroactive effect. *See St. Cyr*, 533 U.S. at 321 n.46. However, it strikes us as more reasonable to focus on the reliance elements, as laid out in *St. Cyr*, than other elements of a retroactivity analysis, put forth in cases such as *Landgraf*. *St. Cyr* confronted the exact statutory provision at issue here—§ 212(c)—and laid out a sensible framework for deciding whether IIRIRA's repeal of § 212(c) relief has an impermissible retroactive effect. In our view, the *St. Cyr* approach is entitled to more weight than a decision concerning the retroactivity analysis of a completely different statute. *See Landgraf*, 511 U.S. at 250; *see also Cohens v. Virginia*, 19 U.S. 264 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

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applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country." *Id.* Unlike the impermissible effects that flow from the decision to rely on a guilty plea in the § 212(c) context, "[i]t is. . . the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Id.*; *id.* at 44 n.10 ("Fernandez-Vargas's claim to such relief was contingent, and it was up to him to take some action that would elevate it above the level of hope. . . . Fernandez-Vargas never availed himself of them or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement."). Although *Fernandez-Vargas* does not control the discrete legal issue before us, we mention it because its reading of *St. Cyr* is consistent with our own. Here, Ferguson does not argue that she relied on some completed act that she is helpless to undo. A jury verdict is not an intentionally committed "past act" that Ferguson committed. It is a byproduct of one's decision to engage in criminal conduct.

We therefore hold that reliance is a component of the retroactivity analysis as it applies to aliens, deportable for criminal offenses, who wish to show that IIRIRA's repeal of § 212(c) has an impermissible retroactive effect. Here, Ferguson did not plead guilty but was convicted by a jury. And aside from her decision to go to trial, she points to no other "transactions" or "considerations already past" on which she relied. Joining the majority of circuits, we decline to extend *St. Cyr* to aliens who were convicted after a trial because such aliens' decisions to go to trial do not satisfy *St. Cyr*'s reliance requirement. Therefore, § 212(c) relief is not available to such aliens.[28] *See Hernandez-Castillo*, 436 F.3d at 520; *Montenegro*, 355 F.3d at 1037; *Rankine*, 319 F.3d at 102; *Chambers*, 307 F.3d at 290-93; *Dias*, 311 F.3d at 458; *see also Saravia-Paguada*, 488 F.3d at 1131; *Armendariz-Montoya*, 291 F.3d at 1121. Accordingly, Ferguson's petition for relief is **DENIED**.

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[28] We express no opinion on whether aliens may prove an impermissible retroactive effect by demonstrating reliance on other "transactions" or "considerations already past" that do not involve a criminal conviction or the decision to go to trial. That issue is not before us in this particular appeal. Nor do we express a view on the availability of § 212(c) relief in circumstances where an alien (convicted after trial) makes an individualized showing of reliance on § 212(c) and affirmatively chooses to wait to file a § 212(c) application to build up a better record. *See Restrepo*, 369 F.3d at 634; *Carranza-De Salinas*, 477 F.3d at 208-210. Here, Ferguson has not claimed such reliance.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A35 730 532 - Miami, FL
Date: Jan. 25 2008

In re: SANDRA *FERGUSON*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip M. Zyne, Esquire

APPLICATION: Waiver of inadmissibility under section 212(c) of the Act

ORDER:

PER CURIAM. This case was last before the Board on June 11, 2002, when we affirmed the May 18, 1999, decision of the Immigration Judge as to the respondent's removability and ineligibility for cancellation of removal, but remanded for the Immigration Judge to determine whether the respondent was eligible to apply for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), pursuant to the United States Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). The respondent, a native and citizen of Jamaica, appeals from the June 1, 2006, decision of the Immigration Judge finding her ineligible for relief under former section 212(c), and reinstating the prior order of removal dated May 18, 1999. The appeal will be dismissed.

We affirm the Immigration Judge's decision in its entirety, and add the following comments. On appeal, the respondent raises two arguments. The first, that the failure of federal regulations to extend *St. Cyr* eligibility for section 212(c) relief to aliens who were convicted after trial is

contrary to law and should not be followed in cases arising within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, is unpersuasive. In the absence of a countervailing precedent decision of the Eleventh Circuit (under whose jurisdiction the present case arises), the clear language of 8 C.F.R. § 1212.3(f)(4) precludes our acceptance of such argument. *See Matter of Fede*, 20 I&N Dec. 35 (BIA 1989) (stating that regulations promulgated by the Attorney General are binding on the Board and Immigration Judges); *see also Matter of Cortez*, 16 I&N Dec. 289 (BIA 1977) (noting that it is settled that the Board and Immigration Judges lack jurisdiction to rule on the constitutionality of immigration statutes and regulations).

We are also unpersuaded by the respondent's second argument, that she should be found eligible to apply for a section 212(c) waiver pursuant to *Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003). The respondent claims to have been served with an Order to Show Cause ("OSC") in 1986, which under *Cunningham* would allow her to apply for a section 212(c) waiver. However, the respondent was subsequently unable to provide any proof in support of her contention. While the Department of Homeland Security ("DHS") initially conceded eligibility on this point (Tr. at 20), the Immigration Judge subsequently allowed the DHS to withdraw such concession (Tr. at 75), which was determined to have been made in error.[29] We find respondent's argument,

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[29] At the February 2, 2006, hearing, the Immigration Judge stated that the prior DHS attorney who had earlier made such concession "was wrong in his assessment, and I was wrong in accepting his statement at the time" (Tr. at 75). While the transcript reflects the belief of respondent's counsel that the DHS had relied on evidence in its file of the issuance of the 1986 OSC (Tr. at 73), counsel admits in his appellate brief that "subsequently, it was determined that there was no evidence in the file showing that an Order to Show Cause had ever been issued." Respondent's Appeal Brief at 10.

that her being served with an OSC in 1986 is "the only logical assumption" because "[i]t is inconceivable to believe" that she would be released without one after completing her sentence, to be impermissibly speculative.

Accordingly, the appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File A 35 730 532
Date: June 1, 2006

In the matter of:
SANDRA FERGUSON, Petitioner
IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (2) (B) (i).
APPLICATION: Waiver under Section 212(c).

ON BEHALF OF THE RESPONDENT:
Phillip Simon, Esquire

ON BEHALF OF THE GOVERNMENT:
David J. Kelly, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

This case comes before the Court on a remand from the Board of Immigration Appeals. It appeared on May 18, 1999. This Court had rendered a decision, finding the respondent removal as charged and also finding her ineligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act (hereinafter the Act) and ordering her removed from the United States.

The case was appealed to the Board of Immigration Appeals which, on June 11, 2002, rendered its findings in which it sustained the decision of this Court, but remanded the case for further proceedings, pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2000), to determine whether the respondent was eligible for relief in the form of a waiver under old Section 212(c) of the Act as, according to the Board, the commissioned documents contained in the record of this case did not clearly reflect whether or not said convictions were pursuant to a guilty plea. If they had been pursuant to a guilty plea, then the respondent would have been statutorily eligible, under *INS v. St. Cyr*, to apply for a waiver under Section 212(c).

The Court held an evidentiary hearing in this case on the respondent's application for 212(c), which was filed with the Court pursuant to the Board remand and in that hearing the respondent, under oath, testified and admitted that her conviction was not the result of plea agreement, but that she had actually gone to trial. The parties agree that this is so. And that being the case, the respondent is not eligible for a waiver under Section 212(c) pursuant to *INS v. St. Cyr*. The Court will therefore pretermit said application and restate its order of removal.

The following orders will issued:

ORDERS

IT IS HEREBY ORDERED that the application for a waiver under Section 212(c) be pretermited and denied.

IT IS FURTHER ORDERED that the respondent be removed and deported to Jamaica.

PEDRO A. MIRANDA
Immigration Judge

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A35 730 532 – Miami
Date: June 11, 2002
In re: SANDRA *FERGUSON*
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Philip M. Zyne, Esquire
ON BEHALF OF SERVICE:
Amy Isackson-Rojas
Assistant District Counsel
CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
8 U.S.C. § 1227(a)(2)(A)(iii) -
Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act
8 U.S.C. § 1227(a)(2)(B)(i) -
Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The respondent appeals from the Immigration Judge's May 18, 1999, decision finding her ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and ordering her removed from the United States. The respondent's request for oral argument is denied. The respondent's appeal will be

dismissed in part, but the record will be remanded.

The respondent is a native and citizen of Jamaica who entered the United States as an immigrant in August 1977. The record reflects that she was convicted on July 7, 1986, for delivery of a controlled substance, to wit: cocaine, in violation of Illinois Statute Chapter 56.5 § 1401(a)(2), and sentenced to 6 years in prison (Exh. 3). Although she challenges the admission of evidence relating to this conviction, she has admitted she was convicted of this offense (Tr. at 22), and she concedes on appeal that she is removable as charged due to this conviction (Respondent's Brief at 3). We therefore do not address this challenge.

The respondent further argues on appeal that the Immigration Judge erred in finding her convicted of an aggravated felony and therefore ineligible to apply for cancellation of removal. We find no error in the Immigration Judge's conclusion that the 1986 conviction is an aggravated felony. Section 101(a)(43)(B) of the Act states that a "drug trafficking crime," as defined in 18 U.S.C. § 924(c), is an aggravated felony. Section 924(c)(2) defines a drug trafficking crime as any felony punishable under the Controlled Substances Act, or one of the other federal statutes listed. Disposition of this issue is guided by our recent precedent decision in *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002), where we held that the determination of whether a state drug offense constitutes a "drug trafficking crime" must be made by reference to pertinent authority from the relevant circuit court of appeals. Accordingly, we turn to an examination of the pertinent law of the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this proceeding arises.

The Eleventh Circuit has agreed with other circuit courts that "for a drug offense to come within 18 U.S.C. § 924(c)(2), and hence to fit within the definition of aggravated felony, two criteria must be met: (1) the offense must be punishable under one of the three enumerated statutes, and (2) the

offense must be a felony." *See United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999), *cert. denied*, 528 U.S. 844 (1999). The respondent's conviction for delivery of a controlled substance is punishable under the Controlled Substances Act. *See* 21 U.S.C. § 841(a) (penalizing distribution of a controlled substance); *see also* 21 U.S.C. § 802 (the term "distribute" means to "deliver" a controlled substance). Furthermore, the Eleventh Circuit concluded that a crime is a felony within the meaning of section 924(c)(2) if it is classified as a felony by the jurisdiction in which the perpetrator was convicted. *See United States v. Simon, supra.* The respondent's offense is classified as a felony in Illinois (Exh. 3). *See* Ill. Stat. Ch. 56.5 § 1401(a). Thus, under *Simon*, the respondent's conviction is considered a "drug trafficking crime" within the meaning of section 924(c)(2), and is therefore an aggravated felony under section 101(a)(43)(B) of the Act. The respondent is consequently ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act.

Nevertheless, remand of this matter is appropriate under the United States Supreme Court's recent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Court held that section 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for section 212(c) relief at the time of their plea under the law then in effect. The conviction documents contained in the record do not clearly reflect whether or not the respondent's conviction was pursuant to a guilty plea (Exh. 3). *See generally Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002) (finding that under *St.Cyr*, a defendant who pleads guilty in a criminal matter is not similarly situated to a defendant who does not enter a guilty plea). Thus, it is appropriate to remand the record for the submission of evidence regarding her possible eligibility for relief under section 212(c). Accordingly, the respondent's appeal will be dismissed in part, but the record will be remanded for further proceedings

consistent with the foregoing opinion.

ORDER: The appeal is dismissed with regard to removability and eligibility for cancellation of removal.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File A 35 730 532
Date: May 18, 1999

In the matter of:
SANDRA FERGUSON, Petitioner
IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (2) (B) (i).
APPLICATION

ON BEHALF OF THE RESPONDENT:
Anis Saleh, Esquire

ON BEHALF OF SERVICE:
Catherine Muhletaler, Esq.
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Jamaica who was admitted into the United States on or about August 4th, 1977 as an immigrant. She was convicted on July 7th, 1986 in the Circuit Court for Cook County, Illinois, for the offense of delivery of a controlled substance, to wit: cocaine in violation of Illinois statute 56.5-1401-A(2), and was placed in removal proceedings through a Notice to Appear dated July 5th, 1998,

as amended by additional charges of inadmissibility filed by the Immigration and Naturalization Service (hereinafter the Service) on April 6, 1999. Based on the respondent's admissions, as well as the conviction records submitted by the Service, and marked as group Exhibit 3, it appears that the respondent was, in fact, convicted as alleged and, having been thus convicted, it appears that she is, in fact, removable under Section 237(a)(2)(b)(i) of the Immigration and Nationality Act, as amended, in that anytime after admission she has been convicted of a violation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana. Since the respondent has been convicted for delivery of a controlled substance, to wit, cocaine, it appears that she is, in fact, removable under Section 237(a)(2)(b)(i) of the Immigration and Nationality Act and the Court will so find.

Given the nature of the respondent's conviction, it appears that she, at this time, is not eligible for relief from removal, even though she is an immigrant and has been a lawful, permanent resident of this country since August 4th of 1977. Because of the nature of her convictions, she is ineligible for relief in the form of cancellation of removal and it does not appear to the Court that she is eligible for any other form of relief, nor is she applying for relief. The Court, therefore, has no choice but to order that the respondent be removed from the United States as follows.

ORDER

IT IS HEREBY ORDERED that the respondent be removed and deported to Jamaica based on the charges contained in the Notice to Appear.

PEDRO MIRANDA
U.S. Immigration Judge

Title 8. Aliens and Nationality

Chapter 12. Immigration and Nationality

Subchapter II. Immigration

Part II. Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

§ 1182. Inadmissible Aliens

(c) Nonapplicability of subsection (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

Illegal Immigration Reform and Immigrant Responsibility Act

Pub. L. No. 104-208

Sept. 30, 1996

Sec. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(b) REPEAL OF SECTION 212(c).–Section 212(c) (8 U.S.C. 1182(c)) is repealed.